No. 86-690

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DAVID GASAWAY, *d/b/a*
SUBURBAN SEALING COMPANY,

Petitioner,

v.

LABORERS' PENSION FUND AND LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORERS' DISTRICT COUNCIL OF CHICAGO AND VICINITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 24, 1986

QUESTIONS PRESENTED

1. Whether contract formation defenses of duress, fraud in the inducement, and lack of mutuality, all of which were questions left open in McNeff v. Todd, are assertable against a union pension plan, where a twenty-two year old contractor on his first job was confronted with economic coercion by pickets and agents from at least five different unions who demanded that he become unionized by signing a prehire agreement and upon which he resisted by printing his name rather than signing it cursively.

2. Whether federal courts can enforce an illegal union contract, contrary to Kaiser Steel v. Mullins, under which initiation fees and dues are paid directly to union agents, without any written employee authorizations and with actual union knowledge of lack of employee interest, in order to cover up a violation of the explicit provisions of §§ 302(b) and (c)(4) of the Labor Management Relations Act, 29 U.S.C. §§ 186(b), (c)(4).

3. Whether open and notorious non-compliance with a pre-hire agreement, which is conducted by both parties, is known by union business agents, and caused the dismissal of an initial pension fund audit by the union is effective evidence of repudiation of a prehire agreement against a pension plan.

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Petitioner, David J. Gasaway, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on June 25, 1986. A petition for rehearing was denied on September 9, 1986.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Seventh Circuit is unreported and is reprinted in the Appendix

hereto at pages xvii and xxvii, respectively. The order denying a timely petition for rehearing and rehearing en banc is reprinted in the Appendix at page xxix, infra.

Memoranda and orders of the United States District Court for the Northern District of Illinois (Leighton, J.), have not been reported. They are reprinted in the Appendix hereto on pages i, vi, and xiii, infra.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 25, 1986 and a timely petition for rehearing was denied on September 9, 1986.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. § 151 et seq., read as follows:

(f) Agreements covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid, but for clause (1) of

this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

29 U.S.C. §186 provides:

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce....

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept any payment, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(c) Exceptions

The provisions of this section shall not

be applicable...(4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.

STATEMENT OF THE CASE

This case involves the question whether the defenses of duress, fraud in the inducement, lack of mutuality, and illegality in the formation of a pre-hire contract are assertable against a third-party pension fund.

On April 14, 1982, the Laborers' Pension Fund and Laborers' Welfare Fund of the Health and Welfare Department of the Construction and General Laborers' District Council of Chicago and Vicinity (hereinafter "pension fund") invoked the jurisdiction of the district court under § 301 of the National Labor Relations Act, 29 U.S.C. § 185, and § 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132.

On a record stipulated as the proceedings before the National Labor Relations Board in a representation matter, 13-RM-1381 the parties moved for summary judgment as a matter of law. The district court granted summary judgment to the pension fund and denied petitioner's requests for reconsideration. Appeal to the Seventh Circuit resulted in affirmation.

Petitioner David Gasaway established a company called "Suburban Sealing Company" at the age of twenty in 1978. The business was first operated part-time as a college based business to pave and seal residential driveways. In 1980, the operation became a full-time seasonal operation.

On Gasaway's first (and last) commercial job, paving a bank parking lot, he was confronted by picketers and business representatives from at least five different labor unions. (S.A. 17,63)[1]. These included

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[1] "SA" references are to the Supplemental Appendix in the Seventh Circuit referring to the transcript of deposition testimony taken

Laborers' Local 288, Teamsters Local 673, Operating Engineers Local 150, a Carpenters local and an Electrical Workers local. (SA 63-64, 102-106).

Gasaway was told by the union business agents that "You're with the big boys now. You're doing a big boy parking lot. You got to play like the big boys. You got to be in the union. You have to have union people on this job." (SA 25-26). They were hollering at him. (SA 115-116). Gasaway was also told that if he did not comply with the union demands, his entire job would be shut down and the "union loaders" who worked at the quarry where he obtained gravel, would be ordered "not to load your trucks." (SA 26-27, 101). He was also threatened that "you never can tell what might happen to your trucks when your guys are driving down the street and if you're not in the right neighborhood and if

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before the National Labor Relations Board. "Dep" references are to the actual transcript pages.

you're not dealing with the right people." (SA 28).

Gasaway then was told by Joe Griffith, business agent for Laborers' Local 96, that he needed to sign up some of his workers and pay their initiation dues. Gasaway made out two checks of $25.00 for employees Gary Petranak and Oliver Barnes. Griffith added, "I don't personally give a damn whether you tell them they belong to the union or not." (SA 69). Gasaway also paid the Teamsters $230.00 and the Operating Engineers $25.00 for the privilege of operating his own equipment -- as an owner-operator. (SA 128, 152).

Thereafter, Griffith handed Gasaway a "Memorandum of Joint Work Agreement" to sign, which Gasaway refused to do stating, "I'm not signing nothing, I'm willing to sign up a couple of people, like you want, but I'm not signing an agreement." (SA 133). Gasaway called his father, who is a general contractor in the area for advice. He raced to the

jobsite and told the younger Gasaway not to sign the agreement. (SA 71-72).

Griffith then insisted that "You don't have to worry. All the kid has to do is print his name there so we know who we are dealing with." Gasaway repeated that he would not sign the agreement. A "deal" was made to get the job completed. (Dep. 306, 308, 353). Gasaway then printed his name on the document. (SA 71-72).

Employees Petranek and Barnes absolutely refused to join the union and never signed dues authorization documents or application forms to become members of Laborers' Local 288. In fact, they were never told about the payments. (SA 123). As its secretary-treasurer testified, the union was unable to sign them up, fill out pledge cards, or obtain any indication in writing of union support from the two employees when they took the money. (SA 93). Two days later, Gasaway called the union to check if the "supposed"

deal could be used to provide help to run one of his machines. The union said it had no qualified operators. (Dep. 357).

Thereafter, the union never visited any of Gasaway's jobsites, referred any of its members to Gasaway, made any attempt to contact Gasaway for work, or to sign any other agreement. (SA 95, 97).

The only contact between the union and Gasaway arose out of an audit request by the pension fund on May 29, 1981 which was withdrawn when it was brought to Griffith's attention. (SA 279).

The pension fund never sent Gasaway any forms or requested any payments. (SA 145-46). The union never sought subsequent dues on behalf of Petranek or Barnes, never appointed a steward to secure compliance with the agreement (SA 139-43), or provided Gasaway with a copy of the master labor agreement or the trust agreement. (SA 140, 142). None of Gasaway's employees have sought benefits from

the pension fund.

After the pension fund filed suit, Gasaway petitioned the NLRB for a representation election. The Laborers' disclaimed any interest in representing Gasaway's employees on March 25, 1983 before the NLRB.[2] (SA 149-50).

The district court ruled that Gasaway "knew full well the context of the contract presented. That he printed his name believing it was not a signature indicated naivete, but not a lack of meeting of the minds." (App. at iii). The district court also ruled that the payments obtained on behalf of Petranek and Barnes did not violate § 302 of the NLRA, 29 U.S.C. § 186(c)(4).

The court of appeals reasoned that because Gasaway printed his name on the document this did not show a lack of assent to be bound, even though Gasaway did not print his name on

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[2]Whether the disclaimer after the taking of the testimony was timely is presently pending before the NLRB.

the checks made payable to the unions. The court of appeals, agreeing that there was a "confrontation," also ruled that "the 'pressure' present here as well does not constitute duress" (App. at xxv), citing, McNeff v. Todd, 461 U.S. 260, 270 n.9 (1983), and that there was not a repudiation prior to the filing of the representation petition with the NLRB.

Although it specifically noted that Gasaway had raised the issue, the court of appeals completely failed to discuss the fact that it would be enforcing an illegal contract since the illegality of the Laborers' receipt of dues under § 302 should be applied to the pension fund. (See App. at xviii).

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT CREATED A CLEAR CONFLICT IN THE CIRCUITS IN FINDING THAT THE CONTRACT FORMATION DEFENSES OF ILLEGAL "PRESSURE," DURESS OR INVOLUNTARY CONSENT ARE NOT APPLICABLE TO UNION PICKETING AND THREATS TO COERCE ENTRY INTO PREHIRE AGREEMENTS

In Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 n.17 (1982), this Court specifically noted that it has not resolved the question whether a union has a right to use economic pressure such as picketing to compel an employer to enter into a prehire agreement in the first instance. The legislative history to § 8(f) stresses that pre-hire agreements must be voluntary. In remarks made on the floor of the Senate, Senator John F. Kennedy stated:

> It was not the intention of the committee to require by [§8(f)] the making of prehire agreements, but rather, to permit them, nor was it the intention of the committee to authorize a labor organization

> to strike, picket, or otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements.

104 Cong. Rec. 11308 (July 16, 1958).

The court of appeals determined that under the facts presented herein, duress could not be established as a defense against the pension fund, citing McNeff, Inc. v. Todd, 461 U.S. 260, 270 n.9 (1983). There, this Court determined that when a labor union merely informs a subcontractor that his contract with the general contractor calls for the use of union labor on the jobsite and the general contractor informs him "that he was required to sign the agreement to remain on the project", there is no coercion or unlawful "pressure" within the meaning of § 8(f) of the LMRA, 29 U.S.C. § 158(f), to invalidate the

prehire agreement later reached.[3] Id. at 1755. In McNeff, the Court found it "clear in this case that petitioner entered into the prehire agreement voluntarily." Id. at 1758.

The Seventh Circuit mistakenly confuses the situation in McNeff where a union merely conveys union job requirements to a subcontractor who is already bound to apply union scale with a situation where a union pickets to obtain a prehire agreement from a "stranger" contractor and threatens to interfere with the business until such time as an agreement is signed. Connell Construction Co., Inc. v. Plumbers & Steamfitters, Local 100, 421 U.S. 616, (1975). In the latter case, the union uses its coercive economic power to violate the carefully crafted

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[3]The court of appeals declined to rule whether defenses against the union could be asserted against the pension fund. In Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83 n.8 (1982), this Court noted that pension funds have no special status and "are subject to the contracting defenses of nonperforming promisors."

provision "that pre-hire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle." NLRB v. Local No. 103, BSOIW, 434 U.S. 335, 347 n.10 (1978).[4]

Merely because prehire agreements are authorized in the construction industry, does not eliminate the defense that they cannot be unlawfully coerced. The type of "pressure" the Court deemed insignificant in footnote 9 in McNeff was that involved in obtaining subcontracting agreements held permissible under § 8(e) in Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 (1982). That case has no relevance here.

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[4]In Connell, the permissibility of union action to obtain subcontracting agreements was found only if "included in a lawful collective bargaining agreement. . . . In this case, Local 100 had no interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can provide no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firm's from the subcontracting market." (citations omitted).

By its decision below, the Seventh Circuit has removed the ability of nonunion contractors to prove duress and lack of mutual assent, viz., lack of voluntariness, in the formation of a prehire agreements to be based on both union statements and such obvious deeds as picketing.

In NLRB v. Local 542, IUOE, 331 F.2d 99, 106 (3d Cir. 1964), cert. denied, 379 U.S. 889, (1964), the Third Circuit held that it is illegal for a union to engage in picketing to obtain a prehire agreement, since this was the use of coercion which was prohibited by Congress. This same result obtained in NLRB v. Hod Carriers, 285 F.2d 397, 403 (8th Cir. 1960), cert. denied, 366 U.S. 903 (1961), in which the Eighth Circuit stated:

> Although Congress has given validity to such an agreement, voluntarily entered into by the parties, we find no congressional approval of the use of strikes or picketing to compel execution of a prehire agreement. Indeed the legislative history indicates the contrary to be true.

See also NLRB v. Electrical Workers, Local 265, 604 F.2d 1091, 1100 (8th Cir. 1979).

This reasoning fully comports with this Court's more recent decision in NLRB v. Local Union No. 103, Iron Workers, 434 U.S. 335 (1978). There, the Court held that it is an unfair labor practice for a union to engage in picketing to enforce a prehire agreement where it has not obtained majority status. Id. at 346. This result obtained because to hold otherwise would grant the union rights which are reserved by Congress only for majority representatives. This would cause "top-down organizing," a particular objective that Congress in the Landrum-Griffin Act had attempted to limit. Id. at 346-47, citing Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 632 (1975).[5]

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[5]The Seventh Circuit also missed the point that a prehire agreement for a jobsite by jobsite employer does not endure indefinitely. The union must establish a new

The Seventh Circuit, by permitting picketing and union threats to obtain a prehire agreement, loses sight of the Congressional objective that § 8(f) is to be a limited exception to the majority principle; under this holding the court of appeals exalts the form of the contract over the substance of what has been rendered. It is obviously inconsistent for a union to be unable to enforce a prehire agreement through picketing, but able to force the signing of a prehire agreement with the same. McNeff simply does not support the Seventh Circuit's result.

Moreover, the situation at bar is not unique. A tremendous influx of union pension fund cases is causing the federal court system to be overwhelmed. The pending 1986 Annual Report of the Administrative Office of the

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majority at each site to enforce a prehire agreement. Contractors, Laborers, Teamsters & Engineers Pension Plan v. F & H Construction Co., 789 F.2d 430 (8th Cir. 1986); NLRB v. Haberman Construction Co., 641 F.2d 351, 366 (5th Cir. 1981)(en banc).

United States Courts reports that, during the year ending June 30, 1986, 5,735 labor related ERISA cases have been filed and 4,789 cases were pending. 5,277 cases were terminated.

Many of these cases involve small employers misled or tricked into signing agreements that later turn out to be entirely different than even bargained for because of the McNeff ruling. In Operating Engineers Pension Trust v. Giorgi, 788 F.2d 620 (9th Cir. 1986), Judge Kozinski in a concurring opinion, notes that small employers have little bargaining power and that the Ninth Circuit is well aware from numerous cases coming before it that business agents (for the very union before it) have repeatedly misled these employers with separate deals and oral arguments, but that the court must enforce the agreements on written terms not specifically bargained for.[6]

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[6]The case at bar is strikingly similar to UMWA, District 4, v. Otis Elevator Co., Inc., 491 F. Supp. 496, 499 (W.D. Pa. 1980), where the union told the employer he could not work unless an agreement was signed. The court

Labor agreements were fundamentally designed by Congress to preserve the full freedom of contract for the parties. H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970). However, in this case, the terms of the master and trust agreements were never conveyed to Gasaway and Gasaway could not have mutually assented to the terms therein. See Caporale, et al. v. Mar Les, Inc., 656 F.2d 242 (7th Cir. 1981). In that case, Mar Les signed memoranda with the union intending for it to apply to only one employee. However, the forms turned out to recognize the union for all employees and incorporated a collective bargaining agreement and trust agreement. The Seventh Circuit refused to enforce the agreements involved in the case on the grounds that, "[w]hile the agreement may have created some limited

contractual relationship between the parties, it did not bind the defendant to a collective bargaining agreement that was never conveyed to the defendant. There was never mutual assent to the terms sought by the plaintiffs." Id. at 245.

In Operating Engineers Pension Trust v. Gilliam, 737 F.2d 1501 (9th Cir. 1984), the Ninth Circuit refused to enforce a pension contribution provision where Gilliam sought to sign up as an owner-operator but was given a prehire agreement to sign rather than the owner-operator form. "Thus, the surrounding circumstances and the intentions of the parties are relevant to determining if a binding agreement exists." Id. at 1504.

Carpenters Amended & Restated Health Benefit Fund v. Holleman Construction Co., Inc., 751 F.2d 763, 770 (5th Cir. 1985), addressed this issue in deciding that a course of conduct and objective evidence can manifest an intent not to be bound by an agreement. "Having declined

to accept the benefits of the agreement, the Corporation should not be bound by its burdens." Id. at 771.

The court of appeals below briefly distinguishes Mar Les and Gilliam by stating that "Gasaway does not claim ignorance of the document he signed; he does not claim misrepresentation regarding its contents." Therefore, mutual assent. Yet, the court absolutely fails to address Gasaway's argument that he was registering his non-consent to be bound to the document by not utilizing his legal signature and printing his name on it for "identification purposes" only, as requested by the Laborers' business agent. This also demonstrates fraud in the inducement and confirms the clear conflict in the circuits.

This court should settle the issue of duress and lack of mutuality in the formation of contracts which it left open in McNeff. By doing so, it can resolve the conflict between the Seventh and the Third and Eighth Circuits

and guide the lower federal courts and the bar into resolving these cases without the necessity of innumerable appeals.

II.

IT IS INCONSISTENT WITH KAISER STEEL v. MULLINS FOR FEDERAL COURTS TO ENFORCE CONTRACTS FORMED BY SHAKE DOWN PICKETING AND EXTORTED PAYMENTS FROM EMPLOYERS WHICH VIOLATE PUBLIC POLICY REPOSED IN LABOR RACKETEERING STATUTES

In the case at bar, petitioner Gasaway paid the Laborers' business agent money on behalf of two employees who had indicated no interest in the union and had not signed written authorizations for dues, only after being subjected to "blackmail picketing." Danielson v. Joint Board, ILGWU, 494 F.2d 1230, 1237 n.10 (2d Cir. 1974)(payments where union cannot establish a majority with election).

29 U.S.C. § 186(a)(2) prohibits the payment of money by an employer to any officer of a labor organization who "would admit to membership" his employees. 29 U.S.C. § 186(b) prohibits the request by a union agent to

"demand, receive or to accept" any payment of value from an employer. The facts herein fit none of the listed exceptions in 29 U.S.C. § 186(c).

To have been a legal conveyance, the union or Gasaway would have had to obtain a written authorization from each employee authorizing a deduction from wages for membership dues to the union. 29 U.S.C. § 186(c)(4). Both the union and Gasaway knew that no such authorization existed and the union knew that Gasaway's men refused to be unionized. (SA 29-30, 93). Yet, the union still took the money and the union business agent told Gasaway, "I don't personally give a damn whether you tell them they belong to the union or not." (SA 69). At a minimum, § 302 requires that some employees be union members before payments can be made. United States v. Pecora, 267 F.2d 512, 515 (3d Cir. 1959).

In Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77 (1982), this court ruled that federal

courts may not enforce illegal contracts. Under this rule, "the parties to an illegal transaction are left where they find themselves. No aid will be extended to either party, either to enforce the illegal bargain which he made, or to get back what he has parted with in performance thereof. . . ." Murray on Contracts, § 344 at 729 (2d Rev. Ed. 1974).

In Kaiser Steel, the company was sued by the union trust fund to recover alleged deficiencies. This court held that Kaiser Steel was entitled to a defense that the underlying agreement upon which the claim was based was illegal under federal law. Id. at 83. There, Kaiser Steel signed a collective bargaining agreement with the United Mine Workers of America and was required to make contributions to the trust funds for each ton of coal it purchased from a non-UMWA organized company. Kaiser claimed that this requirement violated sections 1 and 2 of the Sherman Act,

15 U.S.C. §§ 1 and 2, and § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e).

In refusing to enforce the agreement, this Court noted that the "pension fund trustees have no special status which exempts them from the general rule that courts do not enforce illegal contracts. Only Congress could create such an exemption and . . . it has not done so." Id. at 83 n.8. Certainly, courts will not lend their aid to a party "seeking to realize the fruits of an agrement that appears to be tainted with illegality." Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 262 (1909).

The events of June 13, 1980 constitute a classic shakedown. Young David Gasaway, on his first commercial venture, found himself and his handful of workers surrounded by hordes of picketers led by at least six veteran business agents, four of whom confronted Gasaway personally, demanding that

he "make a deal" with them (SA. 17, 63-64, 102-106). The "deals" that were offered were quite simple: Gasaway would pay off the business agents, and they would call off the picketers and refrain from taking violent action against Gasaway and his employees. The unions represented by the business agents didn't want to organize workers, they just wanted money, and they were willing to abuse the privileges granted to unions by the federal labor laws in order to get it. (SA. 28, 31-2, 131-8). The prehire agreement was simply a cover to make payments appear to be legitimate.

This situation is representative of a continuing problem in labor relations. In order to combat this form of extortion, Congress added §302, 29 U.S.C. §186, to the N.L.R.A. in 1947. This section was intended,

> to combat "corruption of collective bargaining through bribery of employee representatives by employers,...extortion by employee representatives, and...the possible abuse by

> union officers of the power which they might achieve if welfare funds were left to their sole control." Arroyo v. United States, 359 U.S. 419,425-6,79 S.Ct. 864,868,3 L.Ed.2d 915(1959). (emphasis added).

Walsh v. Schlect, 429 U.S. 401, 410-11(1977).

The Senate Report on the proposed amendment clearly demonstrates the intent to invalidate extortion or payoffs of any type. "Employees will also be protected, under the bill, against shakedown picketing." S. Rep. No. 187, 86th Cong., 1st Sess. 13-14, reprinted in I Legislative History of the Labor Management Reporting and Disclosure Act, 409-10 (1959).

This use of fear to obtain money from an employer has led to criminal convictions under 302(a) in other cases. In United States v. Wilford, 710 F.2d 439 (8th Cir. 1983), cert. denied, 104 S.Ct. 701 (1984), union business agents were convicted for taking dues money from transient truckers for permitting them to work. In United States v. Gruttadauro, No. 85-CR-731-1 (N.D.Ill. 1985) on appeal, No. 86-

1722 and 86-1874 (7th Cir. 1986), a Laborers' business agent was convicted under § 302(a) for pressuring an inexperienced contractor to pay him dues on behalf of employees with whom the union had no contract.

The decision below is wrong as a matter of fact and public policy and likely to be of far reaching significance. This Court should grant certiorari to prevent the undermining of Congressional intent and erosion of prior decisions of the Court.

III.

OPEN AND NOTORIOUS CONDUCT ADVERSE TO THE EXISTENCE OF A PREHIRE AGREEMENT IS SUFFICIENT CONDUCT TO CONSTITUTE REPUDIATION ESPECIALLY WHERE NLRB RELIEF IS UNAVAILABLE DUE TO EXPIRATION OF THE STATUE OF LIMITATIONS

In McNeff v. Todd, 461 U.S. at 170 n.11, this Court reserved judgment on "what specific acts would affect the repudiation of a prehire agreement -- inactivity overtly and completely inconsistent with contractual obligations, or, as respondents suggest, precipitating a

representation election pursuant to the final proviso in § 8(f) that shows the union does not enjoy majority support."[7]

Here, Gasaway precipitated a representation petition to meet this possibility, but has met the futility of relief before the NLRB for two reasons. First, because the § 10(b) limitations period of the NLRA had expired, the Board is unable to rule on the validity of the § 8(f) agreement and second, because the unfair labor practice question is easily avoided by the union renouncing any employee interest at the RM hearing. All that is left of an employer's effort to contest the underlying validity of the agreement, then escapes review. Thus, Gasaway was left with no avenue of defense against the pension fund.

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[7]The courts of appeal and the National Labor Relations Board are in agreement that a writing is not necessary. E.g. Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Harkins Construction & Equipment Co., Inc., 733 F.2d 1321 (8th 1984); Albuquerque Insulation Contractors, Inc., 256 N.L.R.B. 61 (1981).

The Seventh Circuit stated that "breach of the contract itself is not sufficient to give notice of repudiation. See Iron Workers Local 103 v. Higdon, 739 F.2d 280 (7th Cir. 1984)." (App. at xxvi). The court of appeals also determined that "[h]ere, Gasaway's actions are not sufficiently definite to provide the union with notice that he was repudiating the agreement prior to his written letter of January 25, 1983." (App. at xxvi). In Higdon, the court of appeals held that "no repudiation could take place until the union was informed in some manner that the employer no longer intended to be bound by the agreement." Id. at 282. Moreover, the Seventh Circuit put the burden on the employer "to establish facts which support the repudiation." Id.

This view causes two sets of problems. The first is for employers who contest the existence of a prehire agreement, and the second is for those who seek to void a prehire

agreement.

For the former, these employers not being aware they are bound, would not be expected to convey notice or publicize overtly adverse actions to a union, because there would be no point in doing so. For the latter, the opinion fails to account for union behavior during the interim in response to the employer's efforts to repudiate. In McNeff, the court noted that, in fairness, when "[h]aving had the music," the employer "must pay the piper." But, "[b]y the same token, the union cannot simply accept the employer's performance under a prehire contract without upholding its end of the bargain." McNeff, U.S. at 271. Cf. Holleman Construction Co., 751 F.2d at 770.

At bar, Gasaway continuously acted in a manner inconsistent with any agreement which would have served to repudiate an agreement. If there was indeed an agreement, then the

union was also bound to perform under it.[8]

Here, the record is entirely void of any actions taken by the Laborers' union to abide by the agreement. This is simply because there was no agreement. In fact, when Gasaway rebuffed the pension fund on its audit request of May 29, 1981 (SA 147-148), it is uncontested that he called the Laborers' business agent Griffith to "take care of it."

Gasaway's actions have been open and consistent in not conforming with the operation of a document to which he has always insisted he was never bound. By the same token, the union's actions have been similarly instructive, for it never conducted itself to comply with its terms of the "agreement." The totality of the circumstances failed to be observed by the court of appeals.

Since, there is no basis to argue that

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8 "But when such an agreement is voluntarily executed, both parties must abide by its terms until repudiated." McNeff, 461 U.S. at 271.

Gasaway has reaped benefits from the prehire agreement and is now seeking to "avoid paying the bargained-for consideration." McNeff, at 271, the court of appeals erred in finding that he must comply with its terms.

CONCLUSION

This matter is one of first impression for the court which involves the interpretation of a special class of labor contracts that inequitably affects employers in the construction industry. For this reason, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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October 24, 1986

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

ORDER

This cause is before the court on cross motions for summary judgment in plaintiff-trustees' action to collect delinquent fringe benefit contributions pursuant to a pre-hire agreement entered into between the union and defendant employer. It is now incontrovertible that such construction industry agreements are enforceable under Section 8(f) of the Labor Management Reform Act, until rejected or voided by the employer. Jim McNeff, Inc. v. Todd, 103 S.Ct. 1753 (1983). The agreements are lawful even in the face of claims of duress or coercion. Id. at 1758, n. 9.

In the case at bar, defendant signed a laborers pre-hire contract on June 13, 1980, and served written notice of repudiation on January 25, 1983. Prior to rejection, an audit had disclosed that $14,127.57 was due and owing on individuals stipulated to be

laborers on September 7, 1983. It is this sum which forms the basis for plaintiffs complaint.

The parties do not dispute any material facts, and each moves for judgment as a matter of law. Damages have been stipulated. The sole issue for judicial determination is liability on the pre-hire contract. Plaintiffs argue that there is a signed agreement, and therefore an obligation exists to pay money to the Trust Fund. Defendant submits, however, that he only "signed" his name under duress, and that the agreement is thus unenforceable.

While on its face, defendant's defense would seem to be untenable under the holding of Jim McNeff, supra, defendant believes that his position is supported by Operating Engineers Pension Trust v. Gilliam, 737 F.2d 1501 (9th Cir. 1984). That case held that the Jim McNeff decision did not preclude a contract formation defense if evidence showed that the

parties had not entered into a contract at all. Under the facts of Gilliam, an employer signed what he thought was an application for union membership, and not a binding collective bargaining agreement. The court stated that a party who signs a document reasonably believing it is something quite different than it is cannot be bound to the terns of the document. Id. at 1504. While defendant here would wish to fit the facts of his case within the Gilliam mold, thus circumventing the Supreme Court's holding, he cannot comfortably do so. There was no misrepresentation regarding the agreement, and it is safe to assume he knew full well the content of the contract presented. That he "printed" his name believing it was not a signature indicates naivete, but not a lack of meeting of the minds. This court therefore concludes that the duress defense is not available in this action, and the parties' contract is fully enforceable. See also, Chicago District

Council of Carpenters v. Dombrowski, 545 F.Supp. 325 (N.D.Ill. 1982), which disallowed a fraud and duress defense to a collective bargaining agreement, stating that "an employer should not be able to tie up simple contribution actions with this kind of contract law defense really aimed at the union." Id. at 328.

Having carefully reviewed the motions, the parties' submissions, and relevant law, the court concludes there are no material facts in issue which would preclude the grant of summary judgment in this case. Accordingly, plaintiffs' motion for summary judgment is granted, and summary judgment in entered in favor of plaintiffs. Defendant's motion for summary judgment is denied.

/s/ George N. Leighton
United States District Judge

Date: February 1, 1985

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

LABORERS' PENSION FUND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 82-C-2280
	)	
GASAWAY,	)	
	)	
Defendant.	)	

It is ordered and adjudged:

Plaintiffs' motion for summary judgment is granted, and judgment in entered in favor of plaintiffs for $14,127.57.

/s/ McClendon Grice
McClendon Grice
Deputy Clerk

Dated: February 1, 1985

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LABORERS' PENSION FUND AND LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORER'S DISTRICT COUNCIL OF CHICAGO AND VICINITY,	)	
Plaintiffs,	)	
v.	)	No. 83-C-2280
DAVID A. GASAWAY, d/b/a SUBURBAN SEALING COMPANY,	)	Before the Honorable George N. Leighton U.S. District Judge
Defendant.	)	

Memorandum

This cause is before the court on defendant's motion for reconsideration of the court's grant of summary judgment in favor of plaintiff-trustees, in their action to collect delinquent fringe benefit contributions pursuant to a pre-hire agreement entered into between the union and defendant employer. Such agreements are enforceable under Section 8(f) of the Labor Management Relations Act, 29

U.S.C. § 158(f), until rejected or voided by the employer. Jim McNeff, Inc. v. Todd, 103 S.Ct. 1753 (1983). In its February 1, 1985 ruling, the court concluded that defendant's pre-hire agreement with the union was fully enforceable until the time of written repudiation of January 25, 1983, n.9. Even assuming arguendo that contract formation defenses are applicable to pre-hire contracts, the court held that the facts of this case did not support a finding of fraud and duress. But see Operating Engineers Pension Trust v. Gilliam, 737 F.2d 1501 (9th Cir. 1984). The court sees no reason to disturb its view that defendant entered into a voluntary and enforceable contract at the time of signing.

On reconsideration, defendant also urges that the contract was void ab initio because of illegality, or that if a contract was formed at all, it was only for 1 or 2 days (the length of the first commercial job). The court does not find the illegality argument to

have much substance. While defendant claims that there was unlawful conduct regarding initiation fees, constituting bribery and extortion, he presents no supporting documentation to indicate that payment was not made in accordance with 29 U.S.C. §186(c)(4) which provides that money deducted from the wages of employees in payment of membership dues in a labor organization is a lawful payment by an employer. The court therefore rejects this argument for reconsideration.

In oral arguments before this court, defendant strongly advanced his alternative ground for reconsideration: that the evidence shows he repudiated the agreement by conduct much earlier than January 25, 1983. It is true that a party may repudiate a pre-hire agreement by conduct, and there is no bright line as to what kind of conduct is sufficient to effect a repudiation. We know that engaging in activity overtly and completely inconsistent with contractual obligations will

affect a repudiation, Jim McNeff, Inc. v. Todd, 103 S.Ct. at 1759, n.11, while mere non-compliance with the terms of the agreement will not, International Association of Bridge, Structural & Ornamental Iron Workers v. Higdon Construction Co., 739 F.2d 280, 283 (7th Cir. 1984). Courts have found the following acts constitute repudiation: dishonor of checks for initiation fees and union dues, Suburban Teamsters v. Callaghan Paving, Inc., 583 F.Supp. 105 (N.D.Ill. 1984); openly employing members of another union, Cable Guide Railing Construction Co. v. International Association of Bridge, Structural & Ornamental Iron Workers, 543 F.Supp. 405 (W.D.Pa. 1982), and oral communication of intent to repudiate, Eastern District Council v. Blake Construction Co., 457 F.Supp. 825 (E.D.Va. 1978). The crucial element required for conduct sufficient to constitute repudiation is that it be such to put the union on notice that the agreement is terminated. International

Association of Bridge, Structural & Ornamental Iron Workers v. Higdon Construction Co., 739 F.2d at 282. The only affirmative act in the record here which could possibly be argued to be a repudiation is the employer's calling the union on the second day, and stating, "We don't have anyone who runs the paver. That's why I supposedly joined up with you guys so you can help me, and now you tell me you don't have anybody." (Gasaway, dep., p.22). Defendant construes this admission as acknowledging that the agreement was no longer effective, "because the union couldn't even send any persons from the hiring hall." But the court construes it differently. There is no specific statement that defendant intended to disavow the agreement; in fact, his calling the union hall for men indicates otherwise. Under such facts, the court cannot find a repudiation by conduct, even if defendant thereafter did not pay union scale, hire union employees, or pay into trust funds. These

acts constitute inactivity, and not the bald conduct required to put the union on notice that the employer no longer intended to be bound by the agreement. It is clear to the court, on the undisputed facts of this case, that repudiation became effective when formally communicated to plaintiffs on January 25, 1983.

Having carefully reviewed the grounds advanced for reconsideration, including the motion, the parties' submissions, and evidence and arguments presented at the oral hearing, the court concludes that they are without merit. Accordingly, defendant's motion for reconsideration is denied, and the court adheres to its earlier ruling granting judgment in favor of plaintiffs. Plaintiffs are to submit a schedule of attorney's fees and costs for the court's approval. They should be warned, however, that, in the court's view, this is not an "exceptional" case, so as to justify the award of a

multiplier. Hensley v. Eckerhart, 103 S.Ct. 1933, 1940 (1983).

So ordered,

/s/ George N. Leighton
George N. Leighton
United States District Judge

Dated: April 19, 1985

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

ORDER

This cause is before the court on "Defendant's Second Motion for Reconsideration and, Alternatively, For Limited Taking of Testimony and Clarification of Implicitly Mandatory Nature of Fees Contrary to the Discretionary Language of the Statute and Request for Further Oral Argument."

This court, on February 1, 1985, entered summary judgment in favor of plaintiffs in their action to collect fringe benefit contributions pursuant to a pre-hire agreement entered into between the union and defendant employer. Defendant moved for reconsideration of the order, and after oral argument the court on April 19, 1985, issued a memorandum discussing defendant's arguments for reconsideration in detail, and adhering to its earlier ruling. Defendant now moves the court to reconsider its ruling in the motion for reconsideration, claiming that the court

inadequately addressed two issues. Those are: that the contract in question was void as a result of bribery and extortion, and that a fee award is discretionary, not mandatory, in this case.

Defendant persists in his claim that there was unlawful conduct regarding initiation fees, and states that the court was incorrect in concluding that he presented no supporting documentation to indicate that the payment was not made in accordance with 29 U.S.C. §186(c)(4) which provides that payment of membership dues by an employer is a lawful payment. A review of defendant's arguments, again reveals that they are entirely without substance. The evidence is uncontroverted that initiation fees for two employees were paid by employer Gasaway to Union Secretary-Treasurer, Bob L. Thrasher, who issued receipts for the payments. That these employees did not later join the union does not indicate in any way that the payments for

their dues were unlawful when made, or that a court can infer, as defendant submits, that they constituted bribery and extortion.

Defendant makes a nitpicking argument regarding the award of attorney's fees in this case. Whether fees are considered discretionary, 29 U.S.C. §1132(g)(1), or mandatory, 29 U.S.C. §1132(g)(2), ERISA contemplates that a reasonable attorney's fee and costs are recoverable in an action involving delinquent contributions. This court sees no reason not to award fees to the pension fund in this case.

The court directs defendant's attention to Judge Shudar's opinion in Refrigerator Sales Co. Inc. v. Mitchell-Jackson, Inc., No. 81 C 5581 (N.D.Ill. December 16, 1983), West Federal Case News, May 3, 1985. There, a plaintiff imposed on the court with a motion for reconsideration and a new hearing on denial of his summary judgment motion. The court denied the motions, stating, "On any

issue in a summary judgment motion, as in any issue at trial, each party is entitled to one bite at the apple. (Plaintiff) has had one bite. . . In filing its motions for reconsideration and for a new hearing (plaintiff) impermissibly seeks to retry its case." Defendant has had two bites at the apple here. His second motion for reconsideration is denied.

/s/ Leighton, J.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Terence T. Evans, District Judge[1]

LABORERS' PENSION FUND AND LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORER'S DISTRICT COUNCIL OF CHICAGO AND VICINITY,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Plaintiffs,	)	
v.	)	No. 83-C-2280 GEORGE N. LEIGHTON, J.
DAVID A. GASAWAY, d/b/a SUBURBAN SEALING COMPANY,	)	
Defendant.	)	

ORDER

David Gasaway appeals from the judgment of the district court requiring him to make past due payments to the Laborers' Pension and Welfare Funds in the amount of $14,127.57. He

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[1]The Honorable Terence T. Evans, Judge of the United States District Court for the Eastern District of Wisconsin, is sitting by designation.

raises three issues: whether the printing (as opposed to a written signature) of his name on a prehire agreement means as a matter of law that there was no meeting of the minds; whether a federal court should enforce a prehire agreement which, in Gasaway's view, violated the racketeering provisions of the National Labor Relations Act (28 U.S.C. § 186); and whether certain of Gasaway's actions constitute repudiation of the agreement. Gasaway seeks not merely to set aside summary judgment entered against him, but to have summary judgment entered on his behalf dismissing the complaint. The judgment of the district court is affirmed.

In the summer of 1978, Gasaway established a company called Suburban Sealing, Inc., to engage in the business of paving and seal coating driveways and parking lots. On June 13, 1980, he began a commercial job, paving a bank parking lot in Downers Grove, Illinois. Representatives of various unions confronted

him on the job site and informed him that if he was going to take on "big jobs," he would have to be in the union.

In response to the confrontation, Gasaway signed up as an owner-operator with two of the unions. He paid the Teamsters $230, and the Operating Engineers $25.

However, he could not become an owner-operator with the Laborers union. Rather, he made partial down payments on initiation fees on behalf of two of his employees. He wrote two checks for $25 each, payable to the Laborers union. In addition, the Laborers asked Gasaway to sign a prehire agreement. At this point, he called his father to the job site. His father, who had been a general contractor in the area for 30 years, told him not to sign the agreement. However, eventually, after prodding by Joe Griffiths, Business Agent for the Laborers, Gasaway printed his name on the document.

The Laborers' Pension Fund has requested two

audits. None was allowed. On April 14, 1982, this complaint was fi ed in the district court seeking contributions to the fund. On January 25, 1983, Gasaway notified the Laborers in writing of his repudiation of the prehire agreement.

In the district court the parties agreed that no material facts were in dispute, and filed cross-motions for summary judgment. Plaintiffs' motion was granted, and Gasaway moved for reconsideration, somewhat changing the thrust of his argument. His motion for reconsideration was denied, and he moved a second time for reconsideration. When the second motion was denied, he appealed from all three rulings, requesting this court to not merely set aside the summary judgment entered against him, but to dismiss the complaint as well.

Prehire agreements in the construction industry are enforceable under § 8(f) of the Labor Management Reform [sic] Act until they

are rejected or voided by the employer. Jim McNeff, Inc. v. Todd, 461 U.S. 260 (1983). Gasaway, however, contends that the prehire agreement involved here is not valid, first because he printed his name on the agreement rather than signing it. He argues that his action means, as a matter of law, that there was no meeting of the minds in regard to the contract. We disagree.

Neither Operating Engineers Pension Trust v. Gilliam, 737 F.2d 1501 (9th Cir. 1984), nor Caporale v. Mar Les, 656 F.2d 242 (7th Cir. 1981) requires the result Gasaway seeks. Gilliam, supra, stands for the proposition that a person who signs a document reasonably believing it is something quite different from what it is cannot be bound to the terms of the document. Gilliam did not read the documents he signed, but relied on the representations of the union agent who told him that he was signing an owner-operator agreement when in actuality he was signing a short form

bargaining agreement. That sort of misrepresentation is not present here.

In Mar Les, supra, an employer signed two memoranda of understanding, which in turn referred to a collective bargaining agreement and a trust agreement. The memoranda themselves were ambiguous, and the agreements to which they referred were never given to the employer. The court relied on the proposition that if the terms of a contract are not reasonably certain at the time the agreement is signed, no contract is created. At the same time, the court concluded that while the memoranda may have "created some limited contractual relationship between the parties," they did not bind the employer to a collective bargaining agreement. The Mar Les situation is not present here.

Gasaway does not claim ignorance of the document he signed; he does not claim misrepresentation regarding its contents. He claims only that because he printed his name,

he did not assent to be bound. Nevertheless he wrote two checks to the Laborers on behalf of two of his employees. His contention on this point is without merit and the cases on which he relies do not require a reversal of the district court's judgment.

Gasaway also contends that the district court was in error in its views either (1) that duress is not a defense to an action brought by a welfare fund rather than the union itself, as stated in the decision of February 1, 1985, or (2) that the facts of this case do not amount to duress, an alternative ground stated in the memorandum decision dated April 19, 1985. Gasaway asserts that the conduct of the unions constituted a violation of the racketeering provisions of the NLRA, and thus, the prehire agreement was illegal and should not be enforced by a federal court.

According to Gasaway's deposition testimony and his testimony before the National Labor

Relations Board, his men called him on June 13, 1980, to tell him that their job site was being picketed. He went to the scene and was confronted by picketers and a number of officials from various unions. The entire incident lasted less than a day. He joined a couple of unions as an owner-operator and he signed the prehire agreement with the Laborers. These facts, which are undisputed, are viewed diametrically by the union and the company.

It is believed, unnecessary in this case to decide whether duress is a defense in an action brought by a trust fund rather than a union because on the undisputed facts of this case, Gasaway cannot establish that duress is present. In Jim McNeff, supra, the court stated in n. 9, page 270:

> There is no merit to petitioner's claim that it was coerced into entering the agreement. Petitioner was simply informed that the general contractor on the jobsite was bound by a union signatory subcontracting clause in it collective bargaining agreement with the Union. That clause required petitioner to enter into a

> similar agreement with the Union if it wanted to stay on the jobsite. . . . Petitioner cannot rely on such "pressure," made lawful by the construction industry proviso, to support its contention that it entered the prehire agreement at issue in this case involuntarily.

The "pressure" present here as well does not constitute duress.

Finally, Gasaway contends that the district court was wrong in concluding that the prehire agreement was not repudiated until he sent written notice of repudiation on January 25, 1983.

We agree with the district court that Gasaway's actions prior to the notice are not sufficient to constitute repudiation. Exactly what is required to constitute notice of repudiation is not clear. In Jim McNeff, supra, the court stated at n. 11, pp. 270-271:

> It is not necessary to decide in this case what specific acts would affect the repudiation of a prehire agreement-sending notice to the union, engaging in activity overtly and completely inconsistent with contractual obligations, or, as respondent suggests, precipitating a representation election pursuant to the final proviso in § 8(f) that shows the union does not enjoy majority support.

However, breach of the contract itself is not sufficient to give notice of repudiation. See Iron Workers Local 103 v. Higdon, 739 F.2d 280 (7th Cir. 1984). Here, Gasaway's actions are not sufficiently definite to provide the union with notice that he was repudiating the agreement prior to his written letter of January 25, 1983.

Accordingly, the judgment of the district court is AFFIRMED.

JUDGMENT -- ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

June 25, 1986

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Terence T. Evans, District Judge[2]

LABORERS' PENSION FUND AND LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORER'S DISTRICT COUNCIL OF CHICAGO AND VICINITY,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Plaintiffs-Appellees,	)	
v.	)	No. 83-C-2280 GEORGE N. LEIGHTON, J.
DAVID A. GASAWAY, d/b/a SUBURBAN SEALING COMPANY,	)	
Defendant-Appellant.	)	

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, was

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[2]The Honorable Terence T. Evans, Judge of the United States District Court for the Eastern District of Wisconsin, is sitting by designation.

argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September 9, 1986

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Terence T. Evans, District Judge[3]

LABORERS' PENSION FUND AND LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORER'S DISTRICT COUNCIL OF CHICAGO AND VICINITY,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Plaintiffs-Appellees,	)	
v.	)	No. 83-C-2280
DAVID A. GASAWAY, d/b/a SUBURBAN SEALING COMPANY,	)	GEORGE N. LEIGHTON, J.
Defendant-Appellant.	)	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause on behalf of the defendant-appellant, no judge in active

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[3]The Honorable Terence T. Evans, Judge of the United States District Court for the Eastern District of Wisconsin, is sitting by designation.

the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

xxx

No. 86-690

In the Supreme Court of the United States

OCTOBER TERM, 1986

DAVID GASAWAY d/b/a
SUBURBAN SEALING COMPANY,

Petitioner,

v.

LABORERS' PENSION FUND AND LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORERS' DISTRICT COUNCIL OF CHICAGO AND VICINITY,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND MOTION TO AFFIRM JUDGMENT OF THE SEVENTH CIRCUIT COURT OF APPEALS

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STATUTES

MOTION TO AFFIRM JUDGMENT OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, LABORERS' PENSION FUND AND LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORERS' DISTRICT COUNCIL OF CHICAGO AND VICINITY, respectfully pray this Court pursuant to Supreme Court Rule 16.1 (c), to affirm the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 25, 1986, and the subsequent order denying rehearing, or rehearing en banc on September 9, 1986, as the judgment sought to be reviewed is so unsubstantial as not to need further argument, or merit certiorari, for the reasons demonstrated in Respondents' Response to Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

Respondents submit the following additions to the Statement of the Case found in Petitioner's Petition for Writ of Certiorari.

Petitioner signed a Laborers' Union short form Memoranda of Agreement, (a pre-hire contract), on June 13, 1980 at a job site in Downers Grove, Illinois after consulting with his father, a general contractor. At that time, several Unions were advising the public that Petitioner was not in compliance with area standard wages. Gasaway then voluntarily entered into agreements with the Teamsters, the Operating Engineers and the Laborers Unions.

After executing the contract, Petitioner further evidenced his intent to be bound to the agreement by paying Union initiation fees for two of his employees; Barnes and Petranek. Petitioner was given receipts for all payments made and was furnished a copy of the pre-hire agreement upon execution. He later telephoned the Union Hall to obtain skilled employees.

In his deposition of October 12, 1982, Gasaway stated he requested the Union to furnish him men. (SA60).

Gasaway admits, on page 353, line 20 of the Board transcript regarding a conversation with the late Joe Griffith, Laborers' Business Agent, that;

"Well, we were bargaining, yes or dealing."

He admitted that the Union continued to contact him, (NLRB transcript page 359).

At the time of his deposition and first Answer to the Complaint, which was closer in time to the occurrence, there was no claim that Petitioner's printed name was an act of defiance or that it evidenced or conveyed his intent not to be bound to the agreement.

Suit was filed April 14, 1982 to collect delinquent fringe benefit contributions owing pursuant to the contract. Petitioner's counsel admitted in his Answer filed on August 6, 1982 that the Petitioner executed a valid collective bargaining agreement but raised an affirmative defense of duress. Seven months later, Petitioner's second attorney, adopted duress as a defense, and raised the pre-hire agreement as an additional defense. At no time has a defense relating to improper initiation fee procedures or a violation of 29 USC 186 been asserted by either

counsel as an affirmative defense. It first appeared as an issue in the Motion to Reconsider Entry of Summary Judgment.

Petitioner mailed written notice of a termination of the pre-hire agreement on January 25, 1983, nine months after commencement of the litigation. Then, Petitioner, in a further attempt to repudiate the collective bargaining agreement, filed for an election at the National Labor Relations Board nearly two months after his first repudiation letter.

Petitioner, through counsel, stipulated on September 7, 1985, if liability were established, delinquent fringe benefit contributions owed would amount to $14,127.57.

Cross motions for summary judgment were filed on the liability issue. The Court denied Petitioner's motion; granted Respondents', and entered judgment for a sum certain in an unpublished opinion.

Petitioner filed two motions for reconsideration, both were denied. An appeal to the Seventh Circuit followed. The District Court decision was affirmed in an opinion designated not for publication. Petitioner's Motion for Rehearing with suggestions for rehearing en banc was denied September 9, 1986. This petition for certiorari followed.

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SUMMARY OF ARGUMENT

Respondents submit and request that the Petition for Writ of Certiorari be denied and dismissed and the judgment of the Seventh Circuit be affirmed for the following reasons:

First, it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to require further argument under Supreme Court Rule 16.

Second, the Petition for Writ of Certiorari should be denied and dismissed for the reason that none of the special or important reasons required by Supreme Court Rule 17 exist here. Petitioner moved for Summary Judgment claiming no facts were in dispute and now seeks to raise a host of new issues of fact not considered below.

Third, there is no inconsistency in the Circuit Courts of Appeals or this Court with the application of the Seventh Circuit's interpretation of the law to the facts presented before it.

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ARGUMENT

I. THIS APPEAL FAILS TO WARRANT CONSIDERATION UNDER THE SUPREME COURT RULES

The matter at bar is a routine ERISA collection action brought pursuant to 29 USC Sec. 1145. It does not possess significant legal issues that merit consideration by the United States Supreme Court; nor are there any important questions of federal law or decisions in conflict among other Circuits. This point is best illustrated by the

Seventh Circuit Court of Appeals determination that the opinion did not warrant publication under Seventh Circuit Rule 35, which virtually mirrors Supreme Court Rule 17.

The criteria for publication under Rule 35 (c) are as follows:

"(c) - *Guidelines for Method of Disposition.*

(1) *Published opinions.* A published opinion will be filed when the decision

(i) establishes a new, or changes an existing rule of law;

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law;

(B) by describing legislative history; or

(C) by resolving or creating a conflict in the law;

(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or

(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.

(2) *Unpublished orders.* When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order. The order will ordinarily contain reasons for the judgment, but may not do so if the court has

> announced its decision and reasons from the bench. A statement of facts may be omitted from the order or may not be complete or detailed."

The Seventh Circuit has already evaluated this case to determine if compelling interest or issues were present and found this case to be wholly lacking. It did not find any conflict in the law between the circuits or any important or novel federal question. Accordingly, the Motion to Affirm the Judgment is warranted as the questions on which the decision depend are so wanting in substance as not to require further argument; *Hodges v. Snyder* 261 U.S. 600, 67 L.Ed 819 (1923).

II. DURESS IS NOT A VALID DEFENSE TO A FRINGE BENEFIT COLLECTION ACTION

The Seventh Circuit determined and Petitioner concedes at p. 16 of his Petition that under the facts presented herein duress could not be established as a defense against Respondents.

This court has recognized that Unions and Fringe Benefit Trust Funds are separate and distinct entities; *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). The acts of peaceful permissible picketing under the publicity proviso of the LMRA could not be a basis of charges against the Plaintiff, but only possibly against a third party, the Union, which has never been a party to this action. Federal labor policy dictates that defenses against a union are not available against third party beneficiaries of collective bargaining agreements such as pension funds, *S. Cal. Retail Clerks v. Bjorklund*, 728 F.2d 1262, 1265-66 (6th Cir. 1984).

This court held, in *Lewis v. Benedict Coal,* 361 U.S. 459, 80 S. Ct. 489 (1960), that a union strike or picketing could not be used as a defense to offset amounts due in fringe benefit fund collection actions.

Similarly, this Court declined certiorari in *Lewis v. Quality Coal,* 279 F.2d 140 (7th Cir. 1959) cert. den., 361 U.S. 929. Therein the Employer claimed the bargaining agreement was void because of duress. The identical defense is claimed at bar. Quality Coal claimed that because of concerted activity and threats by the union, it executed the agreement in order to avoid a work stoppage and strike. The Seventh Circuit at 270 F.2d 143 held:

> "The threat to cause a legal strike and its attendant work stoppage does not of itself constitute duress . . . We find no merit in Quality's claim of invalidity of the agreement because of duress."

The Court also dismissed Quality's contention of lack of mutuality.

Defenses of alleged Union pressure on the Employer through peaceful, permissible picketing to obtain execution of a collective bargaining contract have been uniformly rejected; see *Lewis v. Mill Ridge Coal,* 188 F. Supp. 4 *affd.,* 298 F.2d 552 (6th Cir. 1962); *Lewis v. Collett Coal,* 191 F. Supp. 941 (E.D. Ky. 1960); and *Waggoner v. Dallaire,* 649 F.2d 1362, 1367 (9th Cir. 1981).

The identical defense of alleged Union duress in a fringe benefit fund collection action was raised in *Carpenters Welfare and Pension Fund v. Dombrowski,* 545 F. Supp. 325 (N.D. Ill. 1982). The court rejected the defense and at trial excluded any testimony on this point concluding:

> "An employer should not be permitted to tie up simple contribution actions with this kind of contract law defense really aimed at the Union."

Thus, fraud and duress do not fit within the narrow exception of a *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 102 S. Ct. 851, 70 L.Ed.2d 833 (1982) defense, where a divided court permitted a limited defense only where the very act of making contributions would be intrinsically unlawful, 455 U.S. at 88.

The Seventh Circuit held, in *Trustees of Operative Plasterers and Cement Masons Pension Fund v. Local No. 5*, 794 F.2d 1217, 1229 (7th Cir. 1986); that *Mullins* should *not* apply to a situation where the contract clause requiring the benefit payments is not intrinsically illegal. Thus, the *Mullins* defense strategy has no place at bar. Similarly is *O'Hare v. General Marine Transport*, 740 F.2d 160, 169 (2nd Cir. 1984).

Moreover, under the guise of a *Mullins* type defense, Petitioner asks this court to void the entire contract rather than a specific clause. In *Kaiser Steel v. Mullins* the Court severed only the illegal hot cargo clause that impacted directly on the amounts due. Thus, the relief sought by Petitioner, total exculpation from contract liability is not available under the authority presented to the Court and constitutes an impermissible extension of present labor policy.

In *Mullins* the court was mindful of the legislative history surrounding enactment of 29 USC Sec. 1145 at 455 U.S. 87, 94.

> "Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and

> complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions, this should not be. Senate Committee Labor and Human Resources, 96th Cong. 2d 44."

The Congressional sponsors stated further that they endorsed the holdings of *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), *Huge v. Long's Hauling Co.*, 590 F.2d 457 (3rd Cir. 1978), cert. den. 442 U.S. 918 (1979), and *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962). Thus, the Seventh Circuit's decision is buttressed by the statutory wording of 29 USC 1145 and the congressional intent which adopts the very case upon which the Court relied.

Petitioner does not claim that the fund contributions themselves are illegal. There is no 8(e) hot cargo violation at bar, nor is the *Mullins* anti-trust subcontracting issue present at bar. Accordingly, there is nothing "inconsistent with the law" in making contributions to the Funds as required by 29 USC Sec. 1145.

The judgment of the Seventh Circuit must be affirmed as the questions urged for consideration have been so plainly foreclosed by decisions of this court as to make further argument unnecessary; *Missouri Pac. R. Co. v. Castle*, 224 U.S. 541, 56 L.Ed. 875 (1912).

In *McNeff v. Todd*, 461 U.S. 260 (1983), this Court established that construction industry pre-hire agreements under 29 USC Sec. 158(f) were voidable by the employer, but remain in full force and effect until repudiated.

The unanimous opinion of this court in *Todd* was that monetary obligations assumed by a construction industry

employer under 8(f) contracts could be recovered in Section 301 actions prior to repudiation of the agreement, even though the Union had not attained majority status in the bargaining unit. In deciding this issue, the court expressly rejected *NLRB v. Local 103, Ironworkers* (Higdon), 434 U.S. 335 (1978). This court echoed the identical facts at bar:

> "Although the voidable nature of the pre-hire agreements clearly gave Petitioner the right to repudiate the contract, it is equally clear that Petitioner never manifested an intention to void or repudiate the contract for the relevant period of time."

At bar, the written repudiation and the filing of an election petition did not occur until late in January of 1984, the audit on which Plaintiffs' claim is based, concluded in 1982. Accordingly, the sums shown therein are due and owing as they accrued long before any repudiation occurred.

This Court stated in footnote 11 of the *McNeff* opinion;

> "It is not necessary to decide in this case what specific acts would effect the repudiation of the pre-hire agreement—sending notice to the Union (Gasaway did) . . . or as respondents suggest precipitating a representation election pursuant to the final proviso in Section 8(f) (also as Gasaway did)."

Clearly, the unequivocal acts of repudiation are the written notice which comports to the requirement of 8(d)(1) 29 USC Sec. 158(d)(1) and the filing of a petition for election under Section 9(c) 29 USC Sec. 159(c). The Funds were properly awarded delinquent contributions for

amounts owed prior to repudiation under *Todd v. McNeff* (supra).

III. PETITIONER'S CONDUCT WAS NOT SUFFICIENTLY DEFINITE TO CONSTITUTE REPUDIATION

The Seventh Circuit Court ruled in *International Association v. Higdon Construction Co.*, 739 F.2d 280 (7th Cir. 1984), at page 287;

> "mere non-compliance was not enough to put the Union on notice that the agreement had been repudiated."

Similarly, *Contractors et al., v. Harkins Construction,* 733 F.2d 1321 (5th Cir. 1984) states, "it is only where there is no notice provision that the conduct of the parties may be considered." *Harkins* teaches further at 733 F.2d 1326, that a breach of contract alone will not suffice to establish repudiation.

Paragraph 9 of the Memorandum of Joint Working Agreement to which Defendant was bound expressly provides for "written notice by certified mail."

There can be no legal or factual dispute in light of the case law. Petitioner executed a collective bargaining agreement, admitted in its answer it was bound, and remained bound until it communicated its intent in writing to void the agreement on January 25, 1983.

The Seventh Circuit held herein:

> "Here Gasaway's actions are not sufficiently definite to provide the Union with notice that he was repudiating the agreement prior to his written letter of January 25, 1983." (xxxvi of petition for cert.).

Accordingly, the Seventh Circuit decision must, on this factual matter, be affirmed as it fully complies with the Supreme Court's ruling in *McNeff*.

IV. THERE WAS NO ILLEGAL "PRESSURE" UNDER THE McNEFF DECISION

This court reviewed the concept of duress and pressure vis a vis an 8(f) pre-hire agreement in *McNeff Inc.. Todd* at 461 U.S. 270 footnote 9. The unanimous opinion of the Court was:

> "Petitioner cannot rely on such 'pressure' made lawful by the construction industry proviso to support its contention that it entered the pre-hire agreement at issue in this case involuntarily."

The Seventh Circuit opinion herein duly noted this court's statement of the law and concluded at xxv:

> "The 'pressure' present here as well does not constitute duress."

This conclusion is warranted because the Union's advising the public that Petitioner did not comply with area standard wages is lawful union activity and protected free speech under the First Amendment and 29 USC 158(b) 4(i)(B) which provides:

> "That nothing contained in this clause (B) shall be construed to make unlawful any primary strike or primary picketing."

Petitioner does not contend that the area standards picketing was unlawful. Further, neither the National Labor Relations Board, which has primary jurisdiction in such matters, nor any court below, ever made a determina-

tion that area standards picketing was unlawful or had any unlawful motive. Thus, this question may not be raised here; *Ellis v. Dixson,* 349 U.S. 458 rehearing den. 350 U.S. 855 (1955). Having failed to file an unfair labor practice charge within six months, the 10(b) limitations period, 29 USC Sec. 160(b), the issue is foreclosed.

McNeff does not effect lawful conduct under the LMRA. Thus, the mere presence of area standards pickets cannot constitute coercive pressure or duress as the Seventh Circuit decision herein so held. On this basis alone it must be affirmed.

An employer who claims a collective bargaining agreement is ineffective due to duress or misrepresentation, must take prompt, effective action to rescind the contract. Petitioner cannot wait until sued for non-payment of contributions to take legal action to rescind the agreement; *Lewis v. Owens,* 338 F.2d 740 (6th Cir. 1964), *Lewis v. Mearns,* 168 F. Supp. 134, *affd.* 268 F.2d 427 (4th Cir. 1959). In the absence of illegal activity by the Union, or any action by Petitioner to rescind the agreement the decision of the Seventh Circuit must be affirmed.

Petitioner offers no persuasive authority for its assertion that valid publicity picketing negate not only the fringe benefit provisions, but the contract itself contra to *Mullins* (supra). In both *NLRB v. Local 542,* 331 F.2d 99, and *NLRB v. Carriers,* 285 F.2d 397, unfair labor practice charges against the offending unions were filed and no bargaining agreements were either obtained or set aside. In the former case the picketing was illegal as it had a recognitional purpose when the employer had no operating engineer employees.

The latter case dealt with a secondary boycott situation; neither is present at bar. Petitioner relies further on *UMWA, District 4 v. Otis Elevator Co. Inc.,* 491 F. Supp. 496 (W.D. Pa 1980), an action to compel arbitration on a pre-hire agreement where another union had a majority and a collective bargaining contract. *Otis* is of limited precedential value on the facts at bar and was criticized in *Martin v. Benesh & Bruns Inc.,* 532 F. Supp. 408 at 411 (N.D. Ill 1982).

V. PETITIONER'S AUTHORITY IN INAPPOSITE AS MARLES AND GILLIAM HAVE NO APPLICATION TO THE SITUATION AT BAR

The Seventh Circuit properly concluded that neither *Caporale v. Marles,* 656 F.2d 252 (7th Cir. 1981), nor *Operating Engineers v. Gilliam,* 737 F.2d 1501 (9th Cir. 1984) as each applies to a peculiar factual situation that does not exist herein. The Seventh Circuit stated that misrepresentation and the "*Marles* situation is not present here", (xxii). These are important distinctions as each case was decided upon full factual determinations made after a trial on the merits. At bar no facts were in dispute and each side moved for summary judgment pursuant to Rule 56.

As the Seventh Circuit noted, *Marles* is of slight precedential importance, as the factual scenario at bar is inapposite. Moreover, it has been distinguished by virtually every court[1] to cite it including the Seventh Circuit

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[1]*Carpenters v. Haberman,* 751 F.2d 771 (5th Cir.)
Thelin v. Mitchell, 576 F.Supp. 1404, 1408 (N.D. Ill. 1983)
Painters Fund v. Johnson, 566 F.Supp. 592, 595 (W.D. Mo. 1983)

in *Operating Engineers v. Bliudzius*, 730 F.2d 1093 (7th Cir. 1984).

Similarly, *Gilliam* has not been cited in any reported decision beyond the Ninth Circuit. That court, in reviewing the decision in *Southwest Administrators Inc. v. Rozays Transfer*, 791 F.2d 769 (9th Cir. 1986), virtually distinguished away *Gilliam's* application to only those situations in which a party is induced to believe the nature of his act is something entirely different than it actually is.

Herein the Seventh Circuit applied the same logic and properly held:

> "Gasaway does not claim ignorance of the document he signed; he does not claim misrepresentation regarding its contents." (xxii)

As the court's holding does not vary from that of the Ninth Circuit and is in conformity with its own application of its *Marles* opinion it must be affirmed.

VI. PETITIONER FAILED TO SHOW ANY ILLEGALITY OR VIOLATION OF 302(c)(4)

On the record before this court there is no threat or intimidation attributable to the Laborers Union. In Gasaway's deposition the remarks quoted in Petitioner's statement of facts were attributed to the Teamsters.

Petitioner now devotes a major portion of its memorandum to an argument that was created in its first Motion for Reconsideration at the District Court level—an alleged violation of 29 USC Sec. 186. This was never presented as an affirmative defense to the Complaint nor in Petitioners' Motion for Summary Judgment.

It is uncontroverted that Gasaway received receipts for all monies paid to the Laborers Union. Copies of the check and receipts appeared in Petitioner's supplemental appendix. Accordingly, the trial court properly held:

> "The Court does not find the illegality argument to have much substance. While Defendant claims that there was unlawful conduct regarding initiation fees, constituting bribery and extortion, he presents no supporting documentation to indicate that payment was not made in accordance with 29 USC 186(c)(4)." (viii)

Even assuming some insignificant procedural error under 302(c)(4) it in no event would effect the payment of fringe benefit contributions under 302(c)(5). There is no claim that Respondents are guilty of any illegality or that this alleged wrongdoing, if it existed, impacts on the computation of Welfare or Pension payments.

Gasaway cannot raise this alleged breach of public policy as a defense in either law or equity. In law, defendant is equally guilty pursuant to 302(a)(1) and 302 (a)(2) of a criminal act; *U.S. v. Pecora*, 798 F.2d 614 (3rd Cir. 1986).

In equity, he would be guilty of unclean hands, laches and estoppel, as this alleged wrong was not timely raised to avoid the contract early on, or raised as an affirmative defense to the action, it cannot now constitute a defense.

A. 29 USC 186(e) DOES NOT SUPPORT PETITIONER'S CONTRACT DEFENSE

In order to "create" a contract defense Petitioner has taken its weakest argument below, determined by the District Court to be "entirely without substance" (xiv,

vii), as, "he presents no supporting documentation to indicate payment was not made in accordance with 29 USC 186(c)(4)" (viii) and elevated it to a key issue herein.

The Seventh Circuit duly noted, at xxiii, that Gasaway was asserting:

> "That the conduct of the unions constituted a violation of the racketeering provisions of the NLRA and thus the agreement was illegal and should not be enforced by a federal court."

However, the Seventh Circuit dismissed the defense and affirmed the judgment of the District Court.

Petitioner claims that a technical violation of 29 USC 186(c)(4) occurred when the Employer paid dues on behalf of two employes after executing a contract with the Union. Petitioner alleges that as the money was not deducted from the wages of employees pursuant to a written assignment from the employees, the dues payment was illegal. As long as the money was not deducted from the employees' wages without their consent there can be no violation of the statute.

Conversely, Petitioner claims that despite the execution of the contract, the payment of dues by the employer violates 302(a). Thus, Petitioner is now claiming the dues payments made, for which receipts were issued by the Union, was a pay off which is contrary to all the evidence herein; *U.S. v. Pecora*, 798 F.2d 614, 618 (3rd Cir. 1986).

Section 302(e), 29 USC 186(e) *Jurisdiction of the courts*, empowers district courts:

> "to restrain violation of this Section."

McCaffery v. Rex Motor Transportation, 672 F.2d 246 (1st Cir. 1982), held that Federal District Courts lack

jurisdiction under Section 302 of the LMRA to entertain suits under Section 302(e) but only to "restrain violations" of Section 302. As this alleged violation occurred in May, 1980; the limitation period is now past for present restraint.

Bowers v. Moreno, 520 F.2d 843 at 846 (1st Cir. 1975) held:

> "Any ultimate relief would be limited to enjoining future payment and would not include the undoing of deeds done."

Gasaway seeks to have the Court undo his execution of the contract, a deed which occurred over 6 years ago and was repudiated in writing three years ago.

Award Service Inc. v. Pension Fund, 763 F.2d 1066 (9th Cir. 1985), reviewed the extent of the forms of relief available under Section 302(e). The Court quoting from its earlier opinion in *Souza v. Teamster Pension Trust,* 663 F.2d 942, (9th Cir. 1981), held that nowhere is it shown in the legislative history that the section intended to provide anything more than injunctive relief for restraints of future violations. *Award Service* states further that the Court cannot remove the limitation which Congress placed on the exercise of that jurisdiction.

There is no proof of any impropriety in the Union's handling of Funds, and neither the District nor the Circuit Court found any violation of 302(c)(4) or any merit to the contention of the existence of wrongdoing.

Petitioner's 302(c)(4) defense is directed to a collateral matter and not to the portion of the agreement for which enforcement is sought. Under *Kaiser Steel v.*

Mullins, it cannot be considered as it does not impact directly on the computation of fringe benefit contributions or their legality.

This is *not* a Union action to enforce dues checkoff provisions of the contract. Such clauses are separate and distinct from fringe benefit contribution requirements. This newly created defense might be considered if it had been properly and timely asserted as an affirmative defense to the Complaint. But, under *Kaiser Steel*, it has no place in a 29 USC 1145 ERISA benefit collection action. More importantly, 302(e) would not bestow upon the Court jurisdiction to afford the relief sought of dissolution of the contract.

Petitioner is hard pressed to prove illegality when he executed a contract requiring payment of dues and initiation fees and received receipts for all monies paid.

The cases cited by Petitioner are criminal actions brought by the United States government pursuant to 29 USC Sec. 186(d) for willful violations done with an intent to benefit the individual or labor official. There is no showing of such conduct. No such criminal action was ever commenced by the Government, no determination of illegality, other than Petitioner's bald assertion, was ever made. The District Court and the Seventh Circuit were correct in finding Petitioner's arguments to be without merit. Accordingly, the decision below must be affirmed.

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CONCLUSION

Respondents pray that the Judgment of the Seventh Circuit Court of Appeals be affirmed and the Petition for Writ of Certiorari be denied as it is manifest that the questions raised are so unsubstantial as not to require further argument as:

1. Petitioner has failed to demonstrate that the Ruling of the Seventh Circuit is in conflict with another Federal Court of Appeals or a decision of this Court.

2. No compelling issue of federal law is present to warrant review on certiorari.

3. The Seventh Circuit did not view the opinion to be of sufficient weight or authority to even merit publication.

Accordingly, Respondents pray that judgment be affirmed and certiorari be denied.

Respectfully submitted,

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For Respondents

No. 86-690

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DAVID GASAWAY, *d/b/a*
SUBURBAN SEALING COMPANY,

Petitioner,

v.

LABORERS' PENSION FUND AND LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORERS' DISTRICT COUNCIL OF CHICAGO AND VICINITY,

Respondents.

PETITIONER'S REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE QUESTIONS PRESENTED BY THE PETITION ARE SUBSTANTIAL

In opposing this Court's issuance of a writ of certiorari and insisting that the court of appeals decision below was correct, Respondents rely primarily on two arguments. First, they suggest that contractual defenses available to a promisor are unavailable against third party beneficiaries such as pension funds notwithstanding the precise opposite ruling of this Court in Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982). The nature of this opposition highlights the very problem which small businesses have in defending cases of this sort. By insisting that Kaiser Steel be read narrowly, the pension funds wish to continue the Seventh Circuit's presumption that all plan collection

activities are indefensible. This development of the law makes no accommodation for the instant case and of coercive factors stronger than those found illegal in Kaiser Steel.

Second, Respondents dispute the existence of any circuit court conflict over the question whether contract formation defenses are available to a young contractor intimidated into "signing" a pre-hire agreement. They do not believe that a difference exists between picketing activities to enforce an existing collective bargaining agreement which covers union members and picketing and other coercive activities to obtain a pre-hire agreement where it has no supporters. As demonstrated below, both arguments which advocate support for the Seventh Circuit's opinion are untenable and inconsistent with national labor policy.

II. RESPONDENTS HAVE FOUND NO CASELAW TO ARGUE THAT THE SEVENTH CIRCUIT'S DECISION IS NOT AT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

Respondents attempt to argue that prior decisions of this court hold that a promisor's "defenses against a union are not available against . . . pension funds" and therefore "duress is not a valid defense to a fringe benefit collection action." (Respondents Br. at 6). In support thereof, the pension funds primarily rely upon decisions issued before the settling decisions of Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) and McNeff v. Todd, 461 U.S 260 (1983).

In Kaiser Steel, this court ruled that union pension funds are entitled to no special status as third party beneficiaries of collective bargaining agreements and thus "are subject to the contracting defenses of non-performing

promisors" 455 U.S. at 83 n.8. Respondents deny this is the law. To do so, they rely solely and wholly on Southern California Retail Clerks Union v. Bjorklund, 728 F.2d 1262 (9th Cir. 1984). Contrary to the pension funds' reading of the case, the Ninth Circuit reaffirmed the validity of Kaiser Steel by holding that "a defense is properly allowable when it relates to a promise to make contributions that is illegal." Bjorklund, 728 Ff.2d at 1266. Bjorklund, a grocer, entered into a collective bargaining agreement with the union and made payments for himself and his son on the basis of statements made by the union that contributions for other employees were not required. The agreement stated otherwise. The Ninth Circuit found that the fraudulent inducement of a contract alone was not a defense to a collection action. Id. Consequently, the court

only considered the defense as applied to the specific pension provision of the agreement.

This finding was criticized in Operating Engineers Pension Trust v. Giorgi, 788 F.2d 620 (9th Cir. 1986)(Kozinski, J.). However, the critical observation about the issue sidestepped by the funds herein is that the Ninth Circuit in Operating Engineers v. Gilliam, 737 F.2d 1501, 1504 (9th Cir. 1984), subsequently ruled that "the surrounding circumstances and intentions of the parties are relevant to determining if a binding agreement exists."[1] The present case not only

[1]The Ninth circuit has recently added a new dimension to these labor cases by holding that a business can defend against a pension plan collection suit only where their was fraud in the execution, but may not defend where there was "fraud in the inducement." and no "meeting of the minds" Southwest Administrators, Inc. v. Rozays's Transfer, 791 F.2d 769, 774 (9th Cir.

presents a direct question of whether any contract formation defenses are available in these collection cases, but also considers the special voluntary and voidable nature of prehire agreements. Petitioner has always asserted that an "agreement" was never entered into and if one was, it is void ab initio on account of duress, a legal point none of these cases have considered. Only the court below has determined that these defenses are not available.

The pension funds argue in the same breath that the existence of union strikes or picketing have uniformly been rejected as evidence constituting duress. Every case cited by the funds predate McNeff v. Todd, and have therefore no

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1986). This development highlights the urgent need to clarify the prevailing rule of law to ensure uniform application.

effect on this case.[2] In McNeff, the Court reaffirmed its decision that prehire agreements were to be entered into only voluntarily. 461 U.S. at 268. The Court also noted that "[i]f, however, an employer could be compelled by picketing to treat a minority union as the exclusive bargaining agent of employees, the § 7 rights of those employees would be undermined to an extent not contemplated by Congress." Id. The paucity of support for the Seventh Circuit's decision that there was an intended contractual execution is highlighted by respondents' retreat to these citations.

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[2]They are: Lewis v. Benedict Coal, 361 U.S. 459 (1960); Lewis v. Owens, 338 F.2d 740 (6th Cir. 1964); Lewis v. Mill Ridge Coal, 188 F. Supp. 4, aff'd, 298 F.2d 552 (6th Cir. 1962); Carpenters Welfare & Pension Fund v. Dombrowski, 545 F. Supp. 325 (N.D. Ill. 1982).

III. PICKETING AND THREATS TO OBTAIN A PREHIRE AGREEMENT ARE AGAINST PUBLIC POLICY

Finally, the pension funds argue that Kaiser Steel provides only a limited defense to making trust contributions and only where the "very act of making the contributions would be intrinsically unlawful." (Respondents Br. at 8). This argument has no previous basis in the record or decision below and further demonstrates how the Seventh Circuit decision is reinforcing a misconception about this Court's prior rulings on these labor issues.

The pension funds and the court below failed to comprehend the distinction between the ability of a union to picket to enforce or obtain a collective bargaining agreement where it is already recognized as the majority representative and picketing to obtain an agreement where it has no majority status. Again,

this distinction was expressly addressed in McNeff: "Allowing a union to picket to enforce a prehire agreement before it attains majority status is plainly inconsistent with the voidable nature of a prehire agreement." Id. at 269. This difference is well recognized; picketing to obtain a prehire agreement is the use of coercion prohibited by § 8(f). NLRB v. Local 542, IUOE, 331 F.2d 99, 106 (3d Cir. 1964), cert. denied, 379 U.S. 889 (1964); NLRB v. Hod Carriers, 285 F.2d 397, 403 (8th Cir. 1960), cert. denied, 366 U.S. 903 (1961).

At bar there is no question that several unions picketed David Gasaway's jobsite. The pension funds for the first time allege that this was area standards picketing only. (Respondents Br. at 13). The facts belie this ludicrous statement, for it is uncontested that the laborers' union and its business agent did more

than just advise the public of a non-union employer, both induced and wanted Gasaway to sign a contract. See Petition, Statement of the Case, p. 8. Moreover, at no point has petitioner "concede[d]" that duress could not be established here on these facts. See Respondents' Br. at 6.

Failure to consider whether or not area standards picketing could "constitute coercive pressure or duress," Br. at 13, reflects the pension funds' and Seventh Circuit's problem here. That is, picketing of itself is coercive, but picketing combined with organizing threats and pressure to sign prehire agreements is exactly the form of illegal pressure contemplated by Congress when it required that these agreements be voluntarily executed. See 104 Cong. Rec. 11308 (July 16, 1958)(Statement of Senator Kennedy).

IV. IT IS AGAINST PUBLIC POLICY TO ENFORCE AN "AGREEMENT" THAT EXISTS ONLY TO COVER-UP ILLEGAL RACKETEERING ACTIVITY

The funds also proceed on the basis that § 8(f) prehire agreements should be treated as akin to § 8(e) subcontracting agreements in reviewing their lawfulness. However, they are alike as apples are to oranges. § 8(e) subcontracting agreements are permissible in the construction industry when a union enjoys majority status. Since they derive from otherwise legitimate collective bargaining agreements, if the provision is found illegal, only the provision is void and unenforceable. The remainder of the contract stands. Kaiser Steel.

However, the applicable question in the § 8(f) context is whether the agreement itself is legitimate and enforceable because it was voluntarily entered into. If not, the entire contract has no

existence. If it is valid, then all terms are enforceable. These distinctions are fundamental.

Remarkably, the pension funds claim that since petitioner failed to file an unfair labor practice charge with the National Labor Relations Board, consideration of the validity of the § 8(f) is foreclosed. As could be anticipated, no counter argument is made to petitioner's point that it would be futile and illogical to file a charge with the Board in order to void an agreement a contractor does not believe exists. See Petition at 33.

The illegality issue was raised by petitioner in his First Opposition to Summary Judgement not in his motion to reconsider, but this has been overlooked by the pension funds. The violation of 29 U.S.C. § 186 ("§ 302, LMRA") is more than a "technical violation" of the

statute. As the pension funds concede, money was paid by Gasaway to the union without employee knowledge.

Hidden transactions were intended to be forbidden by § 302. The requirement that money may only be transferred with employee consent in certain circumstances to employee representatives was carefully chosen by Congress. This court recently refused the opportunity to consider an alternate view in Trailways Lines, Inc. v. Trailways Inc. Joint Council, 785 F.2d 101, 104 (3d Cir. 1986), cert. denied, 55 U.S.L.W. 3310 (No. 86-400, 1986 Term). That case held that "[p]ayments to trustees administering a pension trust are payments to an 'employee representative'" for purposes of § 302, and therefore could be illegal.

All financial transactions are prohibited by § 302, except as provided in the statute. The gimmick used by the

Laborers' union against Gasaway is for the same behavior in which its agent was convicted in United States v. Gruttadauro, No. 85-CR-731-1 (N.D. Ill. 1985), on appeal No. 86-1722 and 86-1874 (7th Cir. 1986). The facts are indistinguishable. A copy of the judgment is attached in the Appendix hereto.

The racketeering issue raised by the petitioner is that in evaluating an illegal contract under § 302 as in Kaiser Steel, the federal courts must account for the public interests involved in the matter and choose the position which follows that policy. The Seventh Circuit and the 5,000 plus cases now docketed in the federal judicial system establish that the lower courts are making up the law of labor contract formation and contract defenses as they go along regardless of the equities involved. In

considering whether illegality is present here, the Court should consider whether any defense is sufficient to preclude enforcement of labor agreements as it said in McNeff, an § 8(f) case as is the instant one.

CONCLUSION

The inevitability of recurring litigation over this issue petitioner predicts will continue until this Court resolves the dispute. For this reason and those stated in the petition, petitioner respectfully requests that the Writ of Certiorari be granted.

Respectfully submitted,

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December 4, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	No. 85 CR 731
	)	
SALVATORE GRUTTADAURO	)	

MEMORANDUM OPINION AND ORDER

Salvatore Gruttadauro, a union business agent, was convicted by a jury on all counts of a four count indictment, charging him with willfully receiving money from an employer in violation of 29 U.S.C. § 186(b)(1) and (d). Gruttadauro moved for judgment of acquittal pursuant to Fed. R. Crim. P. 29 at the close of the government's case. The court now denies that motion as well as the two post-trial motions.

Turning first to the Rule 29 motions, Gruttadauro argues that there was insufficient evidence from which a jury could have found him guilty beyond a

reasonable doubt. The standard to be applied to these pre-verdict and post-verdict motions is the same:

> [T]he test the court must use is whether at the time of the motion there was relevant evidence from which the jury could reasonably find [the defendant] guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the Government . . . bear[ing] in mind that 'it is the exclusive function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences.'

United States v. Marquardt, No. 85-1318 slip op. at 15 (7th Cir. Feb. 28, 1986)(quoting United States v. Beck, 615 F.2d 444, 448 (7th Cir. 1980)). A review of the record shows that the government introduced sufficient evidence to meet this test.

William Hack and Associates, Inc., a corporation located in Bensenville,

Illinois, was an employer of employees who were involved in the restoration of buildings in the Chicago area. William Hack was owner and chief officer of the corporation. Hack testified that, beginning in October, 1977, representatives of various unions began putting pressure on Hack to employ union workers. Hack testified that he had no intention of having his workers join unions, but he did want the unions to "get off his back." He therefore contacted defendant, the business agent for Local No. 1, to see if defendant could help him out. Defendant and Hack met in October 1977, during which time they discussed Hack's problem. As a result of the meeting, defendant sold Hack four union cards. Hack also testified that defendant urged him to sign a union contract with Local No. 1, but he told defendant he did not want to

sign at that time. Defendant sold Hack the cards anyway.

Nothing happened for four years. No union official from Local No. 1 ever visited Hack's job site. No Hack employees paid periodic union dues, and no one from Local No. 1 attempted to collect any dues. Then in the Spring of 1981, Hack was again harassed by union personnel to employ union workers. Hack again contacted defendant to get help. Defendant once more sold union cards to Hack. Defendant renewed his suggestion that Hack get his employees into Local No. 1 , but Hack refused. Defendant sold him more cards anyway. As in 1977, no one from Local No. 1 ever visited Hack's job site. None of Hack's employees paid union dues and Local No. 1 made no attempt to collect any dues. Also, as before, defendant made no further

attempts to get Hack to sign a contract with Local No. 1.

This scenario was repeated twice more, in the Spring of 1982 and in the Fall of 1982. On both occasions, Hack was harassed by unions so he contacted defendant. Defendant sold him more cards without Hack ever signing a contract with Local No. 1.

The union records showed that Gruttadauro turned over to Local No. 1 most of the more than $3,000 Hack paid for the cards between 1977 and 1982. But the records also support the government's contention that defendant knew Hack's employees were not members of Local No. 1 and were never intended to be. For example, Local No. 1 kept an official membership ledger which recorded the name of each member along with his assigned membership number. None of the Hack employees whose names appear on the cards

sold to Hack are listed in the ledger book. Moreover, the Union member's number is supposed to be affixed to his card. The numbers affixed to the cards sold to Hack failed to match the numbers in the ledger books. Next to the ledger book numbers that were supposed to belong to Hack's employees, were the names of unknown persons.

The government presented further evidence that defendant knew Hack's employees were not members of Local No. 1. The international union to which Local No. 1 belongs, the Laborers' International Union of North America, AFL-CIO ("International"), extracts from each local a per capita tax on each of the local's members. But the International never received any per capita amounts for the Hack employees who were supposed to be members of Local No. 1.

Gruttadauro's explanation for all this was that he was fooled by Hack. Counsel argued that defendant was under the impression that he had an oral collective bargaining agreement with Hack on all the occasions on which he received money for cards. But the jury could reasonably find this explanation incredible given the five-year span over which this activity took place, and most importantly, given defendant's twenty-nine years of experience as a business agent for Local No. 1. For these reasons the court finds that the evidence was sufficient, both at the close of the government's case in chief and at the end of the entire case, to support a jury finding of guilt beyond a reasonable doubt.[1]

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[1]The government's rebuttal evidence added very little to its case in chief. Thus, the same evidence which supported the jury verdict had been introduced at

Next defendant seeks an arrest of judgment. He contends that the indictment does not charge an offense. In a pre-trial motion defendant made this same argument. For the reasons discussed in the court's prior resolution of this issue, the motion is denied. See, Memorandum Opinion and Order, March 11, 1986.

In conclusion, defendants [sic] two motions for judgment of acquittal under Rule 29 are denied. The Rule 34 motion is also denied.

E N T E R:

/s/ Ann Claire Williams
Ann Claire Williams, Judge
United States District Court

Dated: April 21, 1986

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the time of the Rule 29(a) motion at the end of the government's case.